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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SCOTT SPENCER DAVIS, Appellant.	2 CA-CR 2007-0321 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200600758

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Amy M. Thorson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Scott Davis was convicted after a jury trial of a single count of aggravated assault with a deadly weapon or dangerous instrument. The trial court imposed a presumptive, 7.5-year prison term and credited Davis with 101 days' time served before sentencing. On appeal, Davis challenges the sufficiency of the evidence supporting his conviction. We affirm.

¶2 We view the facts in the light most favorable to upholding the conviction. *State v. Cox*, 214 Ariz. 518, ¶ 2, 155 P.3d 357, 358 (App. 2007), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). On April 23, 2006, police received emergency calls from concerned witnesses who had seen Davis driving after a woman, "trying to run her down," as she attempted to evade him on foot and hide behind a trailer. A witness estimated Davis's car was traveling at approximately fifteen miles per hour. One witness testified the woman fell down as she was being chased; another said Davis ran over her with his car; a third could not determine whether she had fallen or been struck by the vehicle. The woman appeared to limp after getting up and had an abrasion on her hand but otherwise showed no signs of physical trauma. When police questioned Davis about the incident, he explained that he had pursued the woman in his car as a "scare tactic" and suspected her of wrongfully taking $80 from him.

¶3 The jury found Davis guilty of aggravated assault in violation of A.R.S. § 13-1204(A)(2). The verdict form specified that the jury found beyond a reasonable doubt that

Davis had "[i]ntentionally put another person in reasonable apprehension of immediate physical injury" while "[using] a deadly weapon or dangerous instrument."

¶4 On appeal, Davis argues his conviction of aggravated assault with a deadly weapon or dangerous instrument is not supported by sufficient evidence "because there was no proof that he intended to use the automobile to cause death or serious harm." Although he did not move for a judgment of acquittal on this ground, a conviction based on insufficient evidence constitutes fundamental error. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005). We therefore address the merits of Davis's argument, even though he failed to raise it properly below. *See State v. Hamblin*, 217 Ariz. 481, n.2, 176 P.3d 49, 51 n.2 (App. 2008); *State v. Fontes*, 195 Ariz. 229, ¶ 5, 986 P.2d 897, 899 (App. 1998).

¶5 "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913. "Substantial evidence is more than a mere scintilla"; it is evidence that would permit a reasonable jury to conclude beyond a reasonable doubt that the defendant committed the charged offense. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). The relevant inquiry is whether, based upon the evidence presented, a rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007).

¶6 The state proves aggravated assault under § 13-1204(A)(2) if it establishes that the accused committed simple assault, as defined by A.R.S. § 13-1203, while "us[ing] a

deadly weapon or dangerous instrument." § 13-1204(A)(2). A person commits assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." § 13-1203(A)(2). A dangerous instrument is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(11). It falls to the jury to determine whether an object is a dangerous instrument. *See State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984); *State v. Schaffer*, 202 Ariz. 592, ¶ 9, 48 P.3d 1202, 1205 (App. 2002).

¶7 Here, the state presented substantial evidence showing Davis intended to use his vehicle to make his victim fear for her physical safety. By his own admission to police, Davis drove his car after his fleeing girlfriend to scare her. Her attempt to hide behind a trailer indicated that she felt threatened. *See State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005) (circumstantial evidence sufficient to support conviction). Despite Davis's contention that he pursued her only at a low speed, his car was nonetheless capable of seriously injuring a pedestrian, especially one who had fallen to the ground near the vehicle. From the evidence presented, the jury reasonably could conclude that Davis had intended to place his victim in reasonable apprehension of imminent physical injury by pursuing her in his car and that, under the circumstances, the way he drove or threatened to drive his car could have readily caused death or serious physical injury. Accordingly, all the elements necessary for a conviction under § 13-1204(A)(2) were satisfied.

¶8 Davis acknowledges that "[a]n automobile may be considered a dangerous instrument for purposes of sustaining an aggravated assault conviction," but he argues " there must be evidence that the defendant knowingly and intentionally used the automobile to cause death or serious harm." In support of his argument, Davis cites *State v. Reim*, 26 Ariz. App. 528, 549 P.2d 1046 (1976), *overruled on other grounds by State v. Mikels*, 118 Ariz. 495, 578 P.2d 174 (1978). In *Reim*, we held that convicting a driver under Arizona's former assault-with-a-deadly-weapon statute required "evidence that the vehicle was 'aimed' at the victim with the actual intent to use the automobile as a deadly weapon." 26 Ariz. App. at 530, 549 P.2d at 1048. The *Reim* court essentially reiterated the holding of *State v. Balderrama*, 97 Ariz. 134, 135-36, 397 P.2d 632, 633-34 (1964), in which our supreme court explained that this former statute "restricted the meaning of 'deadly weapon' to its traditional and obvious one."

¶9 Yet neither *Reim* nor *Balderrama* applies to the present aggravated assault statute. *See State v. Carrillo*, 128 Ariz. 468, 471, 626 P.2d 1100, 1103 (App. 1980). A "deadly weapon" is now separately defined in § 13-105(13) as "anything designed for lethal use." Under the terms of §§ 13-1204(A)(2) and 13-105(11), a car may be a dangerous instrument simply by virtue of the circumstances under which it is used; the state is not required to show the defendant had a specific intent to use the vehicle as a dangerous instrument. *See State v. Williams*, 168 Ariz. 367, 371, 813 P.2d 1376, 1380 (App. 1991), *vacated in part on other grounds*, 175 Ariz. 98, 854 P.2d 131 (1993); *State v. Venegas*, 137

Ariz. 171, 175, 669 P.2d 604, 608 (App. 1983); *Carrillo*, 128 Ariz. at 471, 626 P.2d at 1103; *cf. State v. Orduno*, 159 Ariz. 564, 566, 769 P.2d 1010, 1012 (1989) ("A motor vehicle in the hands of a drunk driver is, by definition, a dangerous instrument."). Thus, the state could properly secure an aggravated assault conviction by showing that Davis intended to place the woman he was chasing in reasonable fear of being imminently injured by his vehicle. *See* § 13-1203(A)(2).

¶10 Because the state offered substantial evidence of all elements of aggravated assault with a dangerous instrument, Davis's conviction and sentence are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge